Implications of Legal Pluralism for Natural Resource Management

Ruth S. Meinzen-Dick and Rajendra Pradhan

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1 Introduction

This article draws insights from legal pluralism to propose alternative ways to view property rights and resource users' relationships with natural resources. Such an approach allows for flexible adaptation to changes and uncertainty, which we illustrate through the case of water. Of the institutions that affect how people interact with natural resources, none are more influential than property rights. Property rights not only affect who may use which resource and in what ways, but also shape the incentives people have for investing in and sustaining the resource base over time. Yet approaches to understanding property rights have too often regarded them as unitary and fixed, rather than diverse and changing. Reflecting these conceptions, policymakers have often sought to consolidate rights through statutory law in the name of providing tenure security or in the quest for efficiency through 'well-defined' property rights.

However, such a conception of property rights is flawed on two counts. First, it does not reflect reality because it ignores the many different bundles of property rights that exist, and the multiple bases for claiming property rights. Second, even if a single, unchanging form of property rights were possible, it would not be well adapted to the uncertainties that are frequently encountered in dealing with natural resources.

In this article we argue that, rather than seeking a single definition of property rights, it is better to recognise the multiple and often overlapping bases for claims, and to regard property rights and the uses of resources as negotiated outcomes. Not only does this lead to a more accurate understanding of the situation that resource users face, but it allows greater flexibility to adapt to changes and uncertainty, as the examples from water rights demonstrate.

2 Legal Pluralism and Property Rights

To go beyond the limitations of many conventional treatments of property rights, it is useful to turn our analysis upside down. Instead of beginning with statutory law, legal anthropologists argue for starting with the perspective of people's experience

with access and control, in which individuals draw upon a range of strategies for claiming and obtaining resources. From this vantage point, it is clear that multiple legal and normative frameworks coexist.

In most social settings more than one legal system (defined broadly) becomes relevant. For many social scientists, law is not limited to state law but is understood very broadly, at least by legal anthropologists, as cognitive and normative orders generated and maintained in a social field.[1] It is thus possible to have various kinds of law such as state law, religious law, customary law, donor law and local law. The coexistence and interaction of multiple legal orders within a social setting or domain of social life is called legal pluralism.[2] In such situations individuals can make use of more than one law to rationalise and legitimise their claims, decisions or behaviour. The claimants or disputants use different normative repertoires in different contexts or forums depending on which law or interpretation of law they believe is most likely to support their claims, a process known as forum shopping (K. von Benda-Beckmann 1984).[3]

The different normative and cognitive orders may be sharply distinguished in some contexts, as, for example, in the courts, but they are less sharply distinguished in the everyday life of local communities. At the local level we find a mixture of several normative orders, which are based on long historical tradition, e.g. customary law, new forms of self-regulation, elements of old and new state laws, donor laws, etc. This whole mixture of norms and rules that are expressed and used at the local level is called local law (F. and K. von Benda-Beckmann and Spiertz 1997).

Applying legal pluralism to an examination of the use of resources, it is important to recall that the concept of property rights is an 'umbrella concept', which includes several types of rights to different forms and uses of resources (F. and K. von Benda-Beckmann and Spiertz 1996: 80). These various kinds of rights may be grouped into two broad categories of rights, namely rights to use and rights to regulate, control and make decisions (or in short, decision-making rights) (F. and K. von Benda-Beckmann and Spiertz. 1997; Schlager and Ostrom 1992).

Following Wiber's (1992) approach, property rights may be defined as claims to use or control resources by an individual or group that are recognised as legitimate by a larger collectivity and that are protected by law.[4] Individuals or groups (users, community, state, etc.) may assert claims of various kinds over resources. It is not sufficient to assert claims to the resource; unless claims are accepted by a larger collectivity than the claimants they are not considered legitimate. This becomes clear when there are conflicting claims. Rights are only as strong as the institution or collectivity that stands behind them. The state is one important legitimating institution, but it is not the only one, and in many cases it may not be as relevant as a village, an ethnic community or a users' group.

Rules and laws themselves are subject to negotiation, reinterpretation and change. The way in which people call upon different legal orders, and the negotiation between them, provides some of this dynamism. Nor is it only that local law adapts to be consistent with statutory law; the latter also changes, taking into account a range of religious, customary and other types of law. Thus, different legal orders should not be seen as isolated from one another, but as interacting, influencing each other and 'mutually constitutive' (Guillet 1998).

Principles, rules or laws concerning property rights do not reflect actual practice or actual configuration of property rights' relations. It is important to differentiate between 'the legal construction of rights from the actual social relationships that connect concrete right holding individuals, groups and associations with concrete and demarcated resources' (F. and K. von Benda-Beckmann and Spiertz 1997: 226). Elsewhere (F. and K. von Benda-Beckmann 2000), these are referred to as categorical and concretised rights, corresponding to general rights in principle, and specific rights that an individual can draw upon. It is at the level of the actual social relationship concerning various forms of property that other types of rights and social relationships become very significant, e.g. rights to land, to residence in a village or membership in a community. Power relationships are also very important for they often determine the distribution and actualisation of rights. The actual rights relationships depend on

specific contexts and are a product of locality, history, changes in resource flow, ecology, and social relationships, negotiation and dispute. Laws are but one resource used in the strategies of individuals and groups to acquire, establish, protect and continue their rights.

3 Legal Pluralism and Uncertainty

As Mehta *et al.* (1999) argue, natural resources management is shaped increasingly by different kinds of uncertainties (see below). Legal pluralism has particular applicability to contexts of ecological or livelihood uncertainties (Mehta *et al.* 1999), as well as social and political uncertainties and changes. At the same time, legal pluralism can generate or increase knowledge uncertainties. The linkages between pluralism in property rights and different types of uncertainty include:

Ecological uncertainties. Unpredictable fluctuations in the natural resource base call for different sets of rules to deal with different situations. Who is allowed to use how much water or grazing land will differ during a drought compared to a period of bountiful rainfall. Legal pluralism expands the repertoires available to people to apply in different situations. In particular, people who are experiencing hardship due to drought or other ecological fluctuations may appeal to a variety of norms regarding sharing and meeting basic human needs, instead of rules that give some the rights to exclude others during 'normal' times (Ngaido and Kirk 2001; Sutawan 2000). Such adaptations increase the livelihood security of households that depend on fluctuating natural resources.

Livelihood uncertainties. Changes in uses and users of natural resources often evoke different bases for claims on a resource. As in the case of ecological uncertainties, legal pluralism expands the bases of claims on the resource and allows for dynamic adaptation to new circumstances. For example, locally defined or 'customary' rights to forest or fishing resources may be sufficient to deal with subsistence-level exploitation of the resource, but not to deal with outside users, new technologies that allow for more efficient exploitation of the resource or market penetration that changes the value of the resources. In these cases national or even international law may be called upon to define and enforce rights and limits on resource exploitation.

Livelihood uncertainties can result from the change in customary users, as when men migrate to cities and leave women to take over all farming activities. In such cases, customary rules that limit women's participation in management bodies limit the control rights of female-headed households. However, new rules supported by the state, external donors or non-governmental organisations (NGOs) may call for more female involvement, and hence provide a basis for stronger claims by women farmers.

Users may also acknowledge essential livelihood uses as a basis for claiming resources, even though formal rules prohibit such claims. In this context, as in many others, people consider natural resources not only as commodities but also as objects that have symbolic (including prestige and religious), social security and social exchange aspects.[5]

Social and political uncertainty. Influxes of new migrants, changes in regimes, and other social and political upheavals create uncertainties that are at least as profound as ecological and livelihood uncertainties. Legal pluralism can both emerge from such conditions and help people cope with these uncertainties. Smucker, White and Bannister (forthcoming) relate how locally defined property rights to land, enforced by local recognition, offer peasants in Haiti defence against a predatory state. Unruh (forthcoming) provides a more extreme example from post-war Mozambique, where massive displacement and resettlement of people from different areas disrupted many customary forms of property rights, but the state also lacked the capacity to define or arbitrate property rights. In this situation, multiple rules of evidence were employed to settle conflicts.

Knowledge uncertainty. While legal pluralism can provide a means of coping with ecological, livelihood, social and political uncertainty, it also exacerbates knowledge uncertainty. No one will know all of the pertinent or possibly applicable legal frameworks, and what provisions they have regarding property rights. Instead, legal knowledge

is partial and fragmented. The result is that resource users may act in ignorance of some definitions of property rights.

The other form of knowledge uncertainty that legal pluralism creates or enhances is the knowledge of what other people will do. Institutional economists point out that the great advantage of institutions lies in the way they allow people to predict the behaviour of others. In common property theory, this predictability helps provide assurance that if one abides by the rules governing use of a resource, others will too, thereby overcoming the fear of free riders and the 'tragedy of the commons'. But if multiple legal frameworks can be applied at the same time, and others may be abiding by different laws and definitions of property rights, then that assurance is eroded. These factors often lead economists interested in increasing efficiency, as well as policymakers and analysts interested in sustainable natural resource management, to seek to reduce pluralism and consolidate all under a unitary 'rule of [state] law'.

It would be wrong to assume that knowledge uncertainties, inherent in legal pluralism, are necessarily major obstacles to equitable and sustainable natural resource management. Certainly the flexibility that legal pluralism allows provides an important coping strategy to deal with environmental, livelihood, and social and political uncertainty. Consolidating all property rights under statutory law, even if it were possible, would sacrifice adaptability to changing circumstances. Statutory law can even become a major source of livelihood uncertainty, especially to those who have less money, education, connections, or other resources to give them access to the state legal mechanisms. Recognising diverse sources of property rights is more equitable because it offers most parties some basis for a claim on the resource. Furthermore, legal pluralism distributes knowledge uncertainties among the different stakeholders, so that no one has a monopoly on knowledge, nor is anyone likely to be totally without some notion of property rights.

What legal pluralism does call for is much more attention to negotiation processes. Given the heterogeneous and hierarchical nature of local communities, negotiation means that the powerful can often establish stronger rights. Women, members of lower classes or otherwise disadvantaged groups often lack the knowledge and bargaining power needed to actualise their rights. Establishing effective platforms for negotiation is critical for effective natural resource management. For equity in distribution of concretised property rights, external intervention may be needed to level the playing field. This entails either strengthening the negotiating ability of disadvantaged groups or expanding the repertoire of claims they can make on a resource (e.g. by passing statutory laws giving women more claims to property). Without effective negotiating forums, conflicts can escalate, but with effective means of negotiating, various stakeholders can adapt to changing conditions. The discussion of water rights in the following section illustrates these points.

4 Examples from Water Rights

In many parts of the world, water rights are dynamic, flexible and subject to frequent negotiations (see Bruns and Meinzen-Dick 2000; R. Pradhan *et al.* 1997; R. Pradhan and F. and K. von Benda-Beckmann 2000). This is because water rights, like rights to natural resources in general, are embedded in social, political and economic relationships and are often closely tied to other rights. Changes in any of these relationships and rights affect property rights to natural resources. However, water rights are perhaps more dynamic, flexible, and subject to continued negotiation than other natural resources because of the characteristics of water as a resource. Water is a mobile, fluid and fugitive resource, with a great deal of inherent uncertainty regarding its quantity and location. Uncertainty of water availability is often compounded by floods and landslides, which may change river courses and destroy intake structures, making it impossible to convey water to the locations at the periods when it is needed. But there is demand and need for specific quantities of water at specific times and locations, especially for irrigation and domestic water uses.

Capturing and conveying water to the locations where it is to be used requires collective effort, both to appropriate and convey water and to make and enforce rules for appropriation, allocation and distribution. There are often multiple users and

uses of the same water source, with different categories of rights and rights holders to water as it flows along its course and is captured and conveyed to different locations. For example, the state may claim ownership and control rights to a river throughout its course, while riparian communities may claim control and use rights to the river water as it flows past their localities. The farmers who construct and operate irrigation infrastructures will claim ownership, control and use rights to the water in their canals. Yet others may have tolerated access and limited use rights to water in the canals for irrigation as well as non-irrigation uses, such as for watering livestock, washing clothes and traditional mills (Meinzen-Dick and Bakker 2000; R. Pradhan and U. Pradhan 2000).

The demand for water and the change in the uses of water have increased with the rapid growth of population and lifestyles, urbanisation and industrialisation. Although irrigation is still the largest sector of water consumption worldwide, municipal and industrial uses are growing as much as ten times faster. As a consequence, there has been a tremendous increase in competition and conflict over water between the state and water-resource-based companies on the one hand and local communities on the other, between different local communities and between members of the same local communities.

Attempts by government agencies to regulate water use by different users by means of state law have often not succeeded in decreasing conflicts, and may in fact have led to uncertainty about water rights for the traditional rights holders. This is because elites control the decision-making processes that legitimise the rules for allocation and distribution of water (Adhikari and Pradhan 2000). However, programmes and alliances can help disadvantaged groups have a stronger negotiating position. Especially important in this regard are changes in state law or bureaucratic procedures, legal literacy campaigns, public interest law firms, and community organising efforts (often sponsored by a variety of NGOs). The following examples show the complexity and dynamism of water rights in different types of situations. While most are drawn from irrigation in South Asia, similar principles are to be found in many contexts, if we look beyond simple statutory explanations.

Dry seasons and years. In times of drought and water scarcity, the rules applied during normal periods or periods of water abundance are often negotiated. Examples include the temporary reallocation of land in the *bethma* system in Sri Lanka (Spiertz and de Jong 1992), 'borrowing' or rearrangement of water flows between Balinese *subaks*, and farmers in some villages in Nepal being allowed to 'steal' water or given tolerated access during drought seasons (K. C. Durga and R. Pradhan 1997; R. Pradhan and U. Pradhan 2000). In these circumstances, norms that appeal to sentiments of equity, community ties, religion and so on come into play.

Expanding systems. In many parts of the world, especially in 'developing countries' heavily dependent on agriculture, a lot of money has been spent by donor agencies and national governments to expand irrigated agriculture, either by constructing new irrigation systems or more often by expansion of existing systems. Expansion of existing systems with government or donor funds leads to negotiations between old and new rights holders and claimants. While original rights holders may claim rights over the irrigation system and water by virtue of their own (or their ancestors') investment in the system, newcomers claim rights to the enlarged system and water by virtue of project investment and government grants. Whose claims will be accepted or what kind of water rights arrangements will be effected depends on negotiation between the rival claimants and their manifold social, political and economic relationships, as well as other norms brought into play (Brewer 2000; F. and K. von Benda-Beckmann 2000; R. Pradhan and U. Pradhan 1996;).

Changing power and alliances. Though water rights are constructed by legal orders, the actualisation of water rights, both categorical and concrete, are effected by social processes because water rights are embedded in social, political and economic relationships (F. and K. von Benda-Beckmann 2000). Adhikari and Pradhan (2000) describe how in a river basin in Dang, with every change in political regime in Nepal, a different set of elites emerged who were able to control the decision-making body that allocated water shares and turns. The new political elites assigned to themselves and their supporters more water shares

and better turns than they formerly enjoyed. In Nepal, women, long denied rights to participate in decision-making processes and to become members of management committees of irrigation systems, have lately acquired rights, even if only categorical, to become members of committees and to participate in meetings, thanks mainly to recent state laws and the efforts of donor agencies and NGOs.

Drinking water. Many religious doctrines and local norms dictate that rights to domestic water supplies, especially for drinking purposes, overflow the narrow definitions of property regimes. For example, according to Nepalese state law valid until 1990, and which is still used as local law in the villages, the proprietor of land on which a spring or well is located has the right to exclude other villagers from using the water source. The landowner may appeal to state or a particular version of local law to prohibit other villagers from using the water, but social pressure and appeal to a Hindu religious norm would force him to grant the villagers use rights to the water source for domestic purposes (Upreti 2000). However, despite religious laws about granting access to drinking water for all, low caste or low status households and individuals may have difficulty in concretising their rights even to drinking water.

These examples indicate that, as Hammoudi (1985) observed, water rights are relational, that is, they are relationships between people over water. In other words, what one holds in one's hand is not water but relations, relations which are often hierarchical, fluid and transitory and subject to change, just like the supply of water.

5 Conclusions

With every change in water supply from a water source, introduction of new uses or users, change in property regime, or social or political upheaval, old rights holders and new claimants dispute and negotiate and renegotiate their water rights relationships. In the process of dispute and negotiation, the claimants refer to different sets of legal orders or different interpretations of the same legal order to legitimise their claims. A single, rigid rule for allocation and distribution of water is unsuitable for taking into account the uncertainties in the quantities and timings of water supply for multiple users and uses.

The fluid nature of water certainly enhances the uncertainty and need for flexibility in dealing with this resource, and the long history and intimate connection between water and life have contributed to the multiplicity of legal orders that address who should have how much water, in what places for what uses. Yet, the principles of legal pluralism apply to other resources as well:

- Instead of looking for clearly defined rules within a single, coherent legal system, it is more useful to recognise the ambiguity of rules and the multiplicity of legal systems. This ambiguity and pluralism gives scope for human agency, through forum shopping and adapting rules in the concretisation of rights. Such agency is critical for dealing with uncertainties that arise from environmental fluctuations, livelihood changes, social and political upheavals, and other sources.

- Instead of trying to identify a single authority, whether it be the state or formal user groups, it is better to identify the overlapping and polycentric forms of governance that influence resource management. To enable institutions to adapt to uncertainty, programmes seeking to set up user groups to manage resources should allow flexibility and adaptation in the organiations, not seek to specify all the rules from the outset.

- At the same time, we should not assume that local groups would be equitable or even have sufficient technical knowledge to manage their resources. We have seen many cases in which power differences and social relations obstructed the actualisation of rights, especially for women or low-status groups. Externally defined laws (from the government, projects, or newly developed organisations) can provide such disadvantaged groups with additional bases for claiming property rights and increase their bargaining power in negotiations for resources. However, for this to be effective, new laws aimed at strengthening the rights of the poor or other marginal groups must be accompanied by programmes to create

awareness by all parties, so that the new laws can be cited and accepted in the negotiation process.

In general, legal pluralism calls for greater humility in policies and programmes. It is not a matter of getting the 'right' law or 'right' institution to allocate or manage resources. Instead, rights to resources will be determined through messy, dynamic processes. Yet this also provides the scope to respond to the uncertainties that resource users face.

Notes

1. See Moore (1973).
2. For legal pluralism, see Griffiths (1986), Merry (1988), F. and K. von Benda-Beckmann and Spiertz (1996), (1997).
3. The term 'forum shopping' is not meant to imply that all participants have equal, voluntary access to all forums, but rather that there is a process of selecting different forums for claims.
4. This paragraph is based largely on Pradhan and Brewer (1998).
5. The links between symbolic and social security aspects of property rights are part of what Scott (1976) referred to as the moral economy.

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